United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

T414

75-1068

UNITED STATES OF AMERICA,

Plaintiff - Appellee

VS

MOZELLE WILLIAMS,

Defendant - Appellant

Appeal From The United States District Court For The Eastern District Of New York

Honorable Edward R. Neaher, Presiding Judge

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

Nature of the Case

I.

Mr. Williams was indicted on January 4, 1972 for a violation of Title 21, U.S.C.A., Section 841(a)(1). The indictment reads as follows:

> On or about the 24th day of September, 1971, within the Eastern District of New York, the defendant Mozelle Williams, knowingly and intentionally did possess with intent to distribute approximately two hundred fifty (250) grams of heroin, a Schedule I narcotic drug controlled substance.
>
> The Indictment was assigned Cause Number 72 CR 3.

COURSE OF PROCEEDINGS AND DISPOSITION

II.

The case was assigned to the Honorable Edward R. Neaher, and after Mr. Williams pled not guilty he filed a motion to suppress, which was heard on May 29, 1974. After the hearing the Government and MR. Williams stipulated in writing on additional evidence. The parties also stipulated that this additional evidence, and the evidence received at the suppression hearing, would be submitted as the complete record for Judge Neaher's final determination and disposition

of this case. On October 4, 1974, the Judge filed his Memorandum of Decision which found Mr. Williams guilty. Thereafter Mr. Williams was sentenced to six years imprisonment. A timely Notice of Appeal was filed in this Court from the denial of the motion to suppress and from the judgment of conviction.

STATEMENT OF FACTS

III.

At LaGuardia Airport on the morning of September 24, 1971, Mozelle Williams presented his ticket to a TWA employee at the boarding counter of Flight 301 heading for Chicago. (App. pp. 43, 44) When Mr. Williams was asked for identification by the employee he told him he had none, asked for his ticket back, and told the employee he would take a later flight. The employee then told Mr. Williams that he would let him go. (App. p. 45) The employee told Mr. Williams to come around and follow him. Mr. Williams did as he was directed. No other prospective passengers were in the area or the entranceway at that time. The employee unfastened a chain, picked up Mr. Williams' blue airlines handbag and they both proceeded to the magnetometer which was located in front of the airplane boarding ramp. (App. pp. 46, 47) At the employee's request Mr. Williams walked through with his handbag and the employee then took the bag from him and

asked him to go through the magnetometer again by himself, which he did. (App. p. 47) Mr. Williams then went through the magnetometer again. (App. pp. 47, 48) Mr. Williams testified he went through the device three times, once with his bag and twice without it. (App. pp. 59, 60) No one told Mr. Williams that on any of his three trips through the magnetometer that a positive reading was given. (App. p. 57)

Allen R. Huttick, the sole Government witness, said that he was on duty as a sky marshall on September 24, 1971 at LaGuardia. (App. p. 5) On the morning of that day Mr. Huttick received a call to screen the passengers boarding TWA flight 301 to Chicago. (App. p. 6) He testified generally about his knowledge of the FAA profile, his duties, his knowledge of the magnetometer, and the fact it was in working order on that day. (App. pp. 7, 8, 9) He observed approximately one hundred passengers going through the magnetometer for that flight and approximately five tripped the magnetometer. (App. p. 41) He said he saw Mr. Williams go through the magnetometer carrying a small bag and there was a positive reading given. Mr. Huttick said that in his presence Mr. Williams was stopped by airline personnel and asked for identification. When he failed to produce any he was turned over to him. (App. pp. 10, 11) Mr. Williams said Mr. Huttick was not present at any time when he went

through the magnetometer, and that he only appeared when summoned by an employee of the airline after he had gone through the third time. (App. pp. 47, 48)

Mr. Huttick proceeded to search the handbag and Mr. Williams after Mr. Williams failed to show him any identification. (App. pp. 11, 12) At the time both searches were conducted Mr. Huttick had no warrant for his arrest or a search warrant. (App. p. 14) At no time prior to the searches did Mr. Williams appear nervous or was there anything unusual about his appearance. (App. p. 15)

Although there is no question that Mr. Williams met the profile, there is absolutely no evidence in the record that Mr. Huttick, prior to the searches, knew or was informed that Mr. Williams was a selectee. There is also no evidence that Mr. Williams' ticket had been marked so as to identify him as a selectee, or that Mr. Huttick had ever seen the ticket prior to the searches. Everyone, including the Judge assumed this important element, but there is no evidence of it.

Mr. Huttick said Mr. Williams consented to a voluntary search of his person which proved negative as to weapons and as to any contraband. (App. p. 11) He also said that Mr. Williams then consented to a search of his bag for weapons, but he did not include that in his report written shortly after the arrest. (App. p. 23) Mr. Huttick

also failed to include in his report that Mr. Williams had consented to a search of his person. (App. p. 20) Mr. Williams said at no time did he consent to a search of his person or his bag. (App. p. 50) Mr. Huttick also searched his bag and on the bottom found a small metal canister which contained a harmless white powder. (App. pp. 12, 13) Under the canister were two small plastic containers with a white powder which turned out to be contraband. (App. pp. 12, 13)

The facts are clear, however, that the searches took place under color of a badge, (App. p. 15) and that it took place in the jetway with the doors closed and only three people were present. (App. p. 12) It is also clear that Mr. Williams was searched in a spread-eagle position against the wall of the jetway, while the bag was on the floor. (App. p. 12) He also saw Mr. Huttick's gun and handcuffs prior to the searches. (App. p. 49) Mr. Williams was also never told that he did not have to submit to a search of his person or property before he boarded the aircraft. (App. pp. 27, 28, 39, 40)

After the searches Mr. Huttick placed Mr. Williams under arrest, took him to his office at gate 31, and performed a field test on the white powder with marquis testers, which he just happened to have handy, although their use in detecting weapons is questionable.

ARGUMENT

I.

THE SKY MARSHAL DID NOT HAVE SUFFICIENT INFORMATION TO MAKE THE SEARCH REASONABLE

Considering the soul searching that each District and Circuit has subjected itself to in justifying the so-called anti-hijack searches it is readily apparent that they find this type of search does not fit squarely within any of the recognized exceptions to the Fourth Amendment's restriction against unreasonable searches and seizures. Because the facts surrounding each search have been varied, numerous and opposite results have been reached. They have agonized over the clash between public safety and the search that takes place each time someone desires to board an aircraft. The problem has been expanded due to the fact that different methods have been used in conducting searches of persons boarding aircraft. Because of these factors the question becomes whether or not the particular facts of this case will justify the warrantless search and seizure of the contraband.

It was generally agreed, by the District Court and both parties that Mr. Williams met the profile

requirements. In fact the District Court said, in his Memorandum of Decision, that this was one of the factors he considered in determining Mr. Williams' guilt. (App. p. 1) A careful reading of the evidence submitted does not reveal that Mr. Huttick knew Mr. Williams met the profile or that his ticket indicated that he did prior to the search.

We do know that Mr. Williams passed through the magnetometer at least twice and possibly three times and that he did activate it. (App. pp. 29, 59) At no time, however, was he asked to remove any metal objects from his person or his handbag before he went through. We also know that he did not have any identification. (App. p. 11) Mr. Williams testified he told the airline employee that when he initially presented his ticket that he had forgotten his wallet and would return for a later flight. (App. p. 45) There was also present the fact that Mr. Williams did not appear nervous, and there was nothing physically unusual about him. (App. p. 15) He was also unaware of any signs or posters warning passengers that they would be searched if they attempted to board an aircraft. (App. pp. 55, 56) Officer Huttick believed that signs were posted but he could not recall in what position they were in or on what wall they were on. (App. p. 29)

Applying these facts, which were the only ones

available to Mr. Huttick prior to the search, to the law it is apparent that the search was unreasonable. In United States v. Ruiz-Estrella, 481 F. 2d. 723 (2d Cir. 1973) this Court considered a seizure in light of the less-than-probable cause standard of Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868 (1968). The circumstances in Ruiz-Estrella consisted of a profile, no identification, and search of a shopping bag. No magnetometer was in use. Our facts are a positive magnetometer reading, and no identification. The Court in Ruiz-Estrella would not apply the Terry exception because there were not enough "specific and articulate facts" known to the officer who conducted the search. Ruiz-Estrella distinguished United States v. Bell, 464 F. 2d. 667 (2d Cir.) citing the existence of a profile, positive magnetometer, no identification, and a recent violent criminal history. This Court in United States v. Clark, 475 F. 2d. 240 (2d Cir. 1973) required "similar compelling circumstances", as in Bell to the opening and examination of a passenger's bag. Our facts, being similar to Ruiz-Estrella, the search does not pass muster. The recent case of United States v. Albarado, 495 F. 2d. 799. (2d Cir. 1974) considered a personal search after only a magnetometer reading. This Court held that in airport searches the ultimate standard is one of reasonableness. This Court then said that the motion to suppress should be

granted because other means to identify the offending metal were not utilized prior to the "frisk". Mr. Williams was never asked to remove any metal objects before going through the magnetometer. If he had been asked to remove the small metal canister from his bag no further search would have been necessary, and the contraband would not have been discovered. Applying the strict Albarado standards to our case the search and seizure must fall for lack of reasonableness.

II.

DID MR. WILLIAMS CONSENT TO THE SEARCH

The District Court also took into account that Mr. Williams had consented to a search of his person and his bag. (App. p. 2) Considering the fact that both searches took place inside the jetway with the doors closed, the only persons present were Mr. Williams, Mr. Huttick and an airline employee, the search was conducted in a spread-eagle position, (App. pp. 11, 12) the search was under color of a badge, (App. p. 15) and that no one told him he did not have to consent to a voluntary search, can

hardly be classified as a waiver of his rights even if he did orally state that he agreed to the search. In Ruiz-Estrella (supra) the defendant handed over his shopping bag when it was requested by the officer. This was done under color of a badge behind locked doors and the Court said:

> "Under these particular facts, the Government has shown no more than acquiescence to apparent lawful authority, and the theory of consent cannot be accepted."

As the Supreme Court said in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041 the question of whether or not the search is voluntary must be determined by "the totality of all the surrounding circumstances."

It is clear that the surrounding circumstances of our case could not support a consent theory.

III.

WAS THE SEARCH UNREASONABLE BECAUSE IT WENT BEYOND AN ATTEMPT TO DISCOVER WEAPONS

There is no question that the sole purpose for the airline search is to discover weapons which might be used to hijack the airplane. This fact has concerned several

courts including the Ninth Circuit which said in the case of United States v. Davis, 482 F. 2d. 893 (9th Cir. 1973):

> "There is an obvious danger, nonetheless, that the screening of passengers and their carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crime. If this occurs, the courts will exclude the evidence obtained."

In the case before this Court, Mr. Huttick had narrowed the search for possible weapons to Mr. Williams' handbag, which was on the floor. (App. p. 23) He then proceeded to place his hand in the bottom of the bag and he found a small metal canister of white powder. Underneath the canister he found and removed two plastic bags which contained a white powder. (App. p. 12) The metal canister contained dextrose, but the two plastic bags contained the contraband. (App. p. 35) Once the offending metal had been discovered there was no need to search further for possible weapons. A simple search of the rest of the bag, with his hands, would have assured him that he had nothing to fear from Mr. Williams, and would have satisfied the sole purpose of the search. The fact that the seizure of other contraband was expected by Mr. Huttick is clearly brought home by the fact that he had "marquis testers" in his office only three hundred feet from where the arrest took place. (App. p. 13) It appears that the Court's

fears are more real than imagined. To insure the search is to be used only for the purpose which justifies its exemption from the warrant requirements the contraband seized here should be excluded from evidence.

IV.

MR. WILLIAMS SHOULD HAVE BEEN GIVEN A CLEAR CHOICE OF EITHER SUBMITTING TO A SEARCH OR LEAVING

Mr. Williams was never told that he would have to be searched before he boarded the aircraft. (App. p. 51) He also testified he had not seen any signs or posters warning about searches before he boarded. (App. pp. 55, 56) The whole problem could be solved by simply requiring that before a "frisk", or search of hand baggage could be carried out, the person should be told that he had a clear choice of not flying or submitting to the search. Some courts have recognized this simple solution. The main reason for granting the motion to suppress in United States v. Meulener, 351 F. Supp. 1284 (1972) was based on the fact the defendant was not given an opportunity to refuse the search if he decided not to board. In United States v. Davis (supra) the Court said:

"It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircract."

This Court in Albarado (supra) called the failure to give an explicit warning "unfortunate, but not necessarily fatal". We would submit that the facts of this case make the failure to warn not only unfortunate but fatal.

V.

THE COURT ERRED IN NOT PERMITTING MR. WILLIAMS TO TESTIFY WHETHER OR NOT HE WOULD HAVE BOARDED THE PLANE IF HE HAD BEEN TOLD HE HAD TO SUBMIT TO A SEARCH

The Defense Counsel, Mr. Wyatt asked the following question which was objected to by the Government:

"Would you have boarded the plane if you had been told that you had to be searched?" (App. p. 51)

The Court sustained the objection for the reason that it was speculative and hypothetical. (App. p. 54) The Court should have permitted Mr. Williams to answer this question since it touches on his knowledge and state of mind at the time the search was conducted. The Court in Meulener (supra) considered the defendant's testimony

that he would not have attempted to board the aircraft if he had been given an opportunity to refuse the search. Judge Neaher should have been given the opportunity to consider Mr. Williams' answer to this question in order to determine the "totality" of the circumstances surrounding the search.

CONCLUSION

For the reasons stated this case should be reversed and the motion to suppress granted.

Respectfully Submitted

Martin H. Kinney
Attorney for Mozelle Williams

IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. T 4141

UNITED STATES OF AMERICA,

Plaintiff - Appellee

VS.

MOZELLE WILLIAMS,

Defendant - Appellant

A F F I D A V I T

MARTIN H. KINNEY being first duly sworn upon his oath says: That on the 24th day of January, 1975, he served two copies of Defendant-Appellant's Brief and one copy of Appellant's Appendix in the above entitled cause, by depositing the same in the United States mail at Gary, Indiana, properly stamped and addressed to:

Mr. Ethan Levin-Epstein
Assistant United States Attorney
United States Attorney's Office
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Martin H. Kinney

Subscribed and sworn to before me this 24th day of January, 1975.

Rose Mehos, Notary Public

My commission expires:
October 27, 1975

IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. T 4141

UNITED STATES OF AMERICA,

Plaintiff - Appellee

VS.

MOZELLE WILLIAMS,

Defendant - Appellant

A F F I D A V I T

MARTIN H. KINNEY being first duly sworn upon his oath says: That on the 24th day of January, 1975, he filed with the Court, twenty-five copies of Defendant-Appellant's Brief, and ten copies of Appellant's Appendix in the above entitled cause, by depositing the same in the United States mail, at Gary, Indiana, properly stamped and addressed to:

Clerk, United States Court of Appeals
For The Second Circuit
Foley Square
New York, New York 10007

Martin H. Kinney

Subscribed and sworn to before me th is 24th day of January, 1975.

Rose Mehos - Notary Public

My commission expires:
October 27, 1975